

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-2744

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

EQUITY DEVELOPMENT, INC.,

PLAINTIFF-APPELLANT,

v.

KIM AYERS,

DEFENDANT,

BRYCO INVESTMENT COMPANY,

**GARNISHEE-DEFENDANT-
RESPONDENT.**

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE GRAM, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Equity Development ("Equity") appeals from a judgment ordering garnishee-defendant, Bryco Investment Company, ("Bryco") to

pay Equity \$1,600 in its non-earnings garnishment of defendant, Kim Ayers. On appeal, Equity argues that Bryco is additionally liable for disbursements made to Ayers after Bryco was served with, but before it answered, Equity's garnishment complaint. We affirm.

I. BACKGROUND

On April 13, 1995, Equity served Bryco with a non-earnings garnishment summons and complaint. By statute, Bryco was required to answer whether it was indebted or under any liability to Ayers.¹ On May 2, 1995, Bryco

¹ Section 812.11, STATS., provides, in relevant part:

Garnishee answer. The garnishee shall, within 20 days from the service of a garnishee summons and complaint, exclusive of the day of service, serve upon the attorney for the plaintiff, and file with the clerk of court, an answer in which the garnishee shall state:

(1) Whether the garnishee was, at the time of the service of the garnishee summons, indebted or under any liability to the defendant, naming the defendant, in any manner or upon any account, specifying, if indebted or liable, the amount, the interest thereon, the manner in which evidenced, when payable, whether an absolute or contingent liability and the facts necessary to a complete understanding of such indebtedness or liability. When the garnishee is in doubt respecting any liability or indebtedness to the defendant, the garnishee may set forth the facts concerning the possible liability or indebtedness.

(2) Whether the garnishee held, at the time of the service of the garnishee summons, title to, possession of or any other interest in any land or personal property or any instruments or papers relating to any such land or personal property belonging to the defendant or in which the defendant is interested. If the garnishee admits holding any interest in property described in this subsection or is in doubt respecting whether the garnishee holds an interest in property described in this subsection, the garnishee shall set forth a description of the property and the facts concerning the property, and the title, interest or claim of the defendant in or to the property.

(continued)

answered, stating that it owed Ayers \$1,600. However, between April 13 and May 2, 1995, Bryco made disbursements to Ayers, which it omitted from its answer.² Equity argues that these omitted disbursements amount to debt or liability that Bryco owed to Ayers, and that these disbursements should have been included in Bryco's answer to Equity's garnishment summons and complaint.

The trial court held that a non-earnings garnishment summons and complaint "captures" only those amounts "due and owing" at the time process is served. The court found that \$1,600 was "due and owing" Ayers at the time Bryco was served. The court held that Bryco was not liable to Equity for any omitted disbursements because they were not "due or to become due" as required by § 812.18(1), STATS.³ Consequently, the court issued an order for judgment in favor of Equity for the sum of \$1,600.

II. ANALYSIS

(3) If the garnishee claims any setoff or defense to any debt or liability or any lien or claim to property described in sub. (2), the garnishee shall allege the facts.

² In addition to the \$1,600 stated in its answer, Bryco disbursed \$370 to Ayers on April 19, 1995, and \$58.03 to Ayers on April 24, 1995. On April 28, 1995, Bryco also authorized a disbursement of \$2,894 to Ayers's subcontractor, Michael Benzing, for roofing, and, on April 30, 1995, Bryco paid an additional \$3,600 to Ayers as an advance for concrete sidewalk work yet to be completed.

³ Section 812.18(1), STATS., provides, in relevant part:

Liability of garnishee. (1) From the time of service upon the garnishee, the garnishee shall be liable to the creditor for the property then in the garnishee's possession or under his or her control belonging to the debtor or in which the debtor is interested to the extent of his or her right or interest therein and for all the garnishee's debts due or to become due to the debtor

....

On appeal, Equity argues that, pursuant to § 812.11(3), STATS., its non-earnings garnishment summons and complaint captures not only the \$1,600 owed by Bryco to Ayers on or before April 13, 1995, but also all of the disbursements Bryco made to Ayers between the April 13, 1995, date of service and Bryco's May 2, 1995 answer. We disagree.

In Wisconsin, the service of a garnishment summons and complaint "creates an equitable lien on the indebtedness of the garnishee defendant to the principal defendant." *Elliott v. Regan*, 274 Wis. 298, 302, 79 N.W.2d 657, 660 (1956). "A garnishee [defendant] is generally liable to the creditor to the same extent as he is liable to suit by the principal debtor in respect to property in his possession" *Grant County Serv. Bureau, Inc. v. W. L. Treweek*, 19 Wis.2d 548, 554, 120 N.W.2d 634, 638-39 (1963).

Whether § 812.11, STATS., holds Bryco, as the garnishee, liable for sums of money that did not become due and owing to Ayers until after the service of the garnishee summons and complaint presents an issue of law, which we review *de novo*. See *DeMars v. LaPour*, 123 Wis.2d 366, 370, 366 N.W.2d 891, 893 (1985) (construing a statute is a question of law). In construing a statute, we must attempt to "give effect to the intent of the legislature, with the plain language of the statute acting as our primary guide." *Georgina G. v. Terry M.*, 184 Wis.2d 492, 507, 516 N.W.2d 678, 682 (1994). On appeal, "we need not give deference to the decisions of the trial court." *Id.* The trial court's findings of fact will not be set aside, however, unless they are clearly erroneous. See § 805.17(2), STATS.

Although § 812.18(1), STATS., provides that the garnishee is liable to the creditor for the garnishee's debts that are to become due to the debtor after the time of service upon the garnishee, this liability is limited by § 812.11(1), STATS.,

to those debts that are to become due under obligations in existence at the time of service of the garnishee summons. The garnishee is not liable for the debts that become due pursuant to obligations created after the time of service of the garnishee summons.

Equity claims a right to the \$2,894 draw Bryco authorized its title insurer to pay Ayers's roofing subcontractor, Michael Benzing. The trial court found that "[b]ased on the portions of the transcript at least that are being brought to the court's attention,⁴ it would appear that the court would have to find that Benzing was the owner of the interest in that contract and therefore his interest is not caught [by Equity's non-earnings garnishment summons and complaint]." (Footnote added.) The trial court based its findings on the evidence. Equity has not presented any evidence that Ayers had an interest in this disbursement. Therefore, with respect to this transaction, we affirm the holding of the trial court.

Equity argues that it is entitled to the \$3,600 paid by Bryco to Ayers on April 28, 1995, as an advance for concrete sidewalk work yet to be completed. Bryco president, Bryan Mantsch, testified that as of April 13, 1995, Bryco did not

⁴ Brenda Fitzpatrick an employee at Title West, the title insurance company retained by Wauwatosa Savings to disburse funds on new construction projects for Bryco, testified:

Q [W]hat was the name of the contractor or subcontractor that sum of \$2,894 was intended to be disbursed to?

A According to information I received, it was Michael Benzing.

Q Do you recall how Mr. Benzing was involved in this project?

A I was told that he did roofing on this project.

owe Ayers \$3,600 for the sidewalk project. Based upon Mantsch's testimony, the trial court found that the contract concerning concrete work was entered into after the service of the non-earnings garnishment summons and complaint. As a result, the court held that this disbursement was "not caught by the garnishment." The evidence supports the trial court's finding and legal conclusion.

Finally, Equity contends that Bryco's April 19 and 24, 1995 disbursements of \$370 and \$58.03 to Ayers were caught by its garnishment complaint. Bryco responds by asserting that, prior to trial, the parties had stipulated that these disbursements were paid as reimbursement for materials purchased by Ayers on behalf of Bryco after April 13, 1995, and, therefore, that they were not caught by Equity's garnishment action. The trial court's findings fail to address these disbursements. In our review of the record, we found that the stipulation was far from explicit. Although the parties appear to have agreed that the check for \$58.03 was for items purchased after April 13, 1995, they did not provide an explicit agreement with respect to the check for \$370. Their comments concerning the \$370 check did not specify when the materials were purchased. Equity's reply brief, however, fails to address Bryco's interpretation of the stipulation. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed to be admitted).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

